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8 RLI INSURANCE COMPANY

9
10 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

11
12 RLI INSURANCE COMPANY, an Illinois corporation,) Case No. 3:19-cv-2022
13 Plaintiff,)
14 v.)
15 LANGAN ENGINEERING,)
16 ENVIRONMENTAL, SURVEYING AND)
17 LANDSCAPE ARCHITECTURE, D.P.C., a)
New York Professional Corporation;
LANGAN ENGINEERING &)
ENVIRONMENTAL SERVICES, INC., a)
New Jersey Corporation; TREADWELL &)
ROLLO, INC., a dissolved California)
Corporation,
Defendants.)

)

22 Plaintiff, RLI Insurance Company (“RLI”) hereby asserts the following complaint against
23 Defendants Langan Engineering, Environmental, Surveying and Landscape Architecture, D.P.C.,
24 Langan Engineering & Environmental Services, Inc. (“LEES”) (the two Langan corporations are
25 collectively referred to herein as “Langan”), and Treadwell & Rollo, Inc., also known pursuant to
26 name change as T&R Consolidated, Inc. (“T&R”):

27 THE PARTIES

28 1. RLI is a corporation organized and existing under the laws of the State of Illinois,

1 with its principal place of business in Peoria, Illinois. RLI is a citizen of Illinois.

2 2. Langan Engineering, Environmental, Surveying and Landscape Architecture,
 3 D.P.C., is a professional corporation organized and existing under the laws of the State of New
 4 York, with its principal place of business in the State of New Jersey. It is a citizen of New York
 5 and New Jersey.

6 3. LEES is a corporation organized and existing under the laws of the State of New
 7 Jersey, with its principal place of business in the State of New Jersey. RLI is informed and
 8 believes and thereon alleges that LEES is a subsidiary of Langan Engineering, Environmental,
 9 Surveying and Landscape Architecture, D.P.C., which was later formed, and that some or all of
 10 the principals, directors, officers and managing agents are common to both corporations. LEES is
 11 a citizen of New Jersey.

12 4. T&R is a dissolved corporation that was organized under the laws of the State of
 13 California up and through the time of its dissolution, with a final principal place of business in the
 14 State of California. Subsequent to the November 1, 2010 transaction, discussed below, and up to
 15 its dissolution in or about 2016, T&R also changed its name to and was known as T&R
 16 Consolidated, Inc., but remained the same corporation. T&R is a citizen of California.

JURISDICTION AND VENUE

17 5. The Court has original jurisdiction over the present action under 28 U.S.C. § 1332,
 18 because there exists complete diversity of citizenship between the parties, and the amount in
 19 controversy exceeds \$75,000. Venue is proper within this District pursuant to 28 U.S.C.
 20 §§1391(b)(2) & 1391(c)(2). One or more of the corporate defendants is subject to personal
 21 jurisdiction in this District, and additionally, a substantial part of the events or omissions giving
 22 rise to the claim occurred, or a substantial part of the property that is the subject of the action is
 23 situated, in this District.

FACTS

24 6. In or about 2004-2009, T&R entered into a series of contracts relating to
 25 geotechnical engineering services related to the construction of a 58-story high-rise including
 26 luxury condominium units located at 301 Mission Street in San Francisco, generally known as the

1 Millennium Tower. Among other services, it has been alleged by numerous parties in various
 2 lawsuits that T&R prepared and issued reports regarding the suitability and characteristics of the
 3 soils underlying the Millennium Tower project, including projections of the anticipated pace and
 4 magnitude of settlement of the building into the soils. RLI alleges on information and belief that
 5 on or about 2008, allegedly prior even to the completion of Millennium Tower, T&R is alleged to
 6 have learned that the amount and/or rate of settlement at the building were greater and/or
 7 happening faster than it had anticipated and/or projected.

8 7. On or about July 16, 2008, T&R prepared and served a letter to its then
 9 professional liability/errors & omissions (E&O) liability insurance company, Terra, providing a
 10 formal notice of circumstances that could give rise to a potential Claim under the Policy (the
 11 “2008 Notice of Circumstances.”)

12 8. A true and correct copy of the 2008 Notice of Circumstances letter, authenticated
 13 and submitted by Langan to the court with a motion filed in the underlying Millennium Tower
 14 Litigation, is attached hereto as Exhibit A.

15 9. T&R disclosed to Terra, in its 2008 Notice of Circumstances, that there was a risk
 16 that the building would experience more long-term settlement than estimated, and that this may
 17 result in certain distress or damage to the building. T&R advised Terra that although it had not
 18 yet received a demand letter or direct allegation of its negligence, there was sufficient concern to
 19 put Terra on notice.

20 10. RLI is informed and believes and thereon alleges that in 2009-10, LEES and T&R
 21 negotiated the terms of an asset purchase agreement whereby LEES would procure certain assets
 22 of T&R in exchange for cash consideration, and many of the principals and staff of T&R would
 23 join LEES. In the course of the negotiation of the transaction, LEES performed due diligence in
 24 investigating T&R and its potential liabilities. RLI is informed and believes and thereon alleges
 25 that in the course of that investigation and/or investigation, LEES learned of the facts concerning
 26 the claims of accelerated, excessive and/or differential settlement of Millennium Tower and the
 27 2008 Notice of Circumstances.

28 11. On or about November 1, 2010, LEES and T&R executed the asset purchase

1 agreement. One section of that Agreement provided that there were no known pending or
 2 threatened actions or suits except those identified on an attached schedule. RLI is informed and
 3 believes and thereon alleges that the attached schedule identified the Millennium Tower
 4 settlement issue as one such potential claim.

5 12. RLI is informed and believes and thereon alleges that one contract T&R had
 6 undertaken relating to the Millennium Tower project prior to November 1, 2010 was a contract
 7 with the building's owner to report on certain work being performed at an adjacent property, the
 8 Transbay Joint Powers Authority's (TJPA's) Transbay Transit Center Project. RLI is informed
 9 and believes and thereon alleges that one consideration of the developers, builders and/or design
 10 professionals at the TJPA Transbay Transit Center construction project, was to seek not to affect
 11 the settlement or degree of settlement at Millennium Tower. Pursuant to this work, T&R would
 12 have access to information regarding continuing sinking and/or alleged differential settlement at
 13 Millennium Tower. RLI is informed and believes and thereon alleges that on or about October of
 14 2010, LEES assumed the obligations of T&R under that contract and the owner of Millennium
 15 Tower consented to that assignment of contract. Thereafter, from 2010 through or about 2014,
 16 and/or beyond, LEES's ongoing work also would have included the review and analysis of
 17 information regarding any continuing settlement of Millennium Tower.

18 13. On or about 2012-13, LEES entered into a contract relating to the development of
 19 another adjacent property, 350 Mission Street. RLI is informed and believes and thereon alleges
 20 that one consideration of the developers, builders and/or design professionals at the 350 Mission
 21 Street construction project, was to seek not to affect the settlement or degree of settlement at
 22 Millennium Tower. Pursuant to its work on the 350 Mission Street project, LEES would have
 23 access to information regarding any continuing settlement of Millennium Tower.

24 14. On or about March 21, 2014, Langan submitted an application for insurance to
 25 RLI, dated January 22, 2014, relating to its potential procurement of a \$5 million excess
 26 professional liability policy, to apply above a \$5 million primary policy already in place with
 27 Markel. The result of adding the excess layer of coverage would be to double Langan's liability
 28 insurance limits from \$5 million to \$10 million. The policy period was to be coterminous with

1 the 2014-15 Primary Policy, from April 1, 2014 to April 1, 2015.

2 15. A true and correct copy of the 2014-15 Application is attached hereto as Exhibit B.

3 16. The insurance for which Langan applied via the 2014-15 Application,¹ and each
4 subsequent Application alleged herein, was requested to extend coverage on behalf of Langan and
5 other specified named insureds. For each year, a single insurance application was prepared and
6 submitted on behalf of and for the benefit of all such named insureds. Thus, at all times from at
7 least January 22, 2014 forward, Langan was acting as the authorized or ostensible agent of and
8 under the express or implied authority of all the named insureds for which it was procuring
9 insurance coverage. Each such named insured for whom coverage was sought ratified the
10 application and adopted its representations in accepting insurance coverage under the policies that
11 resulted, each of which also attached and incorporated its respective application.

12 17. Langan answered “No” to question no. 28(b) on the 2014-15 Application: “Is the
13 Applicant (after proper inquiry of each Director, Officer or Partner of the Applicant or other
14 prospective insured party) aware of any circumstance, incident, situation or accident during the
15 past ten years which may result in a claim being made against the Applicant, its Predecessors in
16 business, or any of the present or past Partners, Officers or Directors of the Applicant.”

17 18. Langan’s answer to question no. 28(b) on the 2014-15 Application was false.

18 19. Langan answered “No” to question no. 28(d) on the 2014-15 Application: “Has the
19 Applicant or any other party proposed for insurance knowledge of injury to people or damage to
20 property during the [last] five years on or at projects where the Applicant has rendered
21 professional services?”

22 20. Langan’s answer to question no. 28(d) on the 2014-15 Application was false.

23 21. Langan and RLI did not enter into a policy as of April 1, 2014. However, months
24 later, Langan approached RLI, on or about August 12, 2014, seeking to add the \$5 million in
25 excess coverage during the current remaining term of the 2014-15 Policy Period to April 1, 2015.
26 On or about August 25, 2014, Langan conveyed to RLI its order to bind coverage. In conjunction

27 ¹ The redactions of each Application and Policy attached as exhibits hereto relate to financial information.
28 Langan should have unredacted copies of each such document in its business records. RLI can provide unredacted
copies to Langan upon request.

1 with Langan's Order, it attached a letter from Langan dated August 25, 2014.

2 22. A true and correct copy of Langan's August 25, 2014 Letter is attached as Exhibit
3 C.

4 23. Langan represented and warranted to RLI: "Please be advised that as of today,
5 August 25, 2014, we are not aware of any claim or circumstances that may give rise to a claim in
6 light of increasing our Professional Liability limits from \$5M to \$10M."

7 24. Langan's August 25, 2014 Letter was false.

8 25. In addition to the affirmative misrepresentations identified herein, Langan
9 concealed and failed to disclose the fact of Millennium Tower's settlement, T&R's alleged
10 implication in causing or contributing to it, T&R's 2008 Notice of Circumstances, T&R's and
11 Langan's continuing work and potential involvement in claims relating to the Millennium Tower.

12 26. In reliance on Langan's material misrepresentations on the 2014-15 Application
13 and in the August 25, 2014 Letter, and in reliance upon Langan's concealments, RLI issued
14 Excess Professional Liability Policy no. RDP0016587, with a policy period of August 25, 2014 to
15 April 1, 2015 (the "2014-15 Policy"). August 25, 2014 to April 1, 2015 is the "2014-15 Policy
16 Period."

17 27. Via endorsement to the 2014-15 Policy, Langan agreed that RLI "has relied upon
18 the statements and representations contained in the [2014 Application] . . . as being accurate and
19 complete. It is further understood and agreed that the Named Insured and the Insureds warrant
20 and represent to [RLI] that the statements and representations made in such application were
21 accurate on the date such representations and statements were so given and in connection
22 therewith the Insureds hereby reaffirm each and every statement made in the application to RLI
23 Insurance Company as accurate as of 1/22/2014 as if it was made to the Insurer on such date. All
24 such statements and representations shall be deemed to be material to the risk assumed by the
25 Insurer, are the basis of this Policy and are to be considered as incorporated into this Policy."

26 28. On or about December 8, 2014, Langan applied for insurance with RLI on a
27 renewal basis, for the following April 1, 2015 – April 1, 2016 Policy Period, submitting an
28 application that had been signed by Langan on December 5, 2014 (the "2015-16 Application").

1 29. A true and correct copy of the 2015-16 Application is attached as Exhibit D.

2 30. Langan answered “No” to question no. 28(b) on the 2015-16 Application: “Is the
3 Applicant (after proper inquiry of each Director, Officer or Partner of the Applicant or other
4 prospective insured party) aware of any circumstance, incident, situation or accident during the
5 past ten years which may result in a claim being made against the Applicant, its Predecessors in
6 business, or any of the present or past Partners, Officers or Directors of the Applicant.”

7 31. Langan’s answer to question no. 28(b) on the 2015-16 Application was false.

8 32. Langan answered “No” to question no. 28(d) on the 2015-16 Application: “Has the
9 Applicant or any other party proposed for insurance knowledge of injury to people or damage to
10 property during the [last] five years on or at projects where the Applicant has rendered
11 professional services?”

12 33. Langan’s answer to question no. 28(d) on the 2015-16 Application was false.

13 34. Above the signature line of the 2015-16 Application, Langan agreed: “If the
14 information in this application or any attachment materially changes between the date this
15 application is signed and the effective date of this policy, you will promptly notify us, and we
16 may modify or withdraw and outstanding quotation or agreement to bind coverage.”

17 35. On April 17, 2015, Langan sent correspondence to its primary insurer, Markel,
18 regarding a “circumstance” that it asked to be handled under the 2014-15 Primary Policy. The
19 basis for the request that Markel accept it under the 2014-15 Primary Policy was that, according
20 to Langan, a principal in Langan’s San Francisco office became aware of the potential claim in
21 March of 2015—during the 2014-15 Policy Period. The “circumstance” Langan reported to
22 Markel related to T&R’s allegedly faulty work at Millennium Tower and the resulting allegations
23 of excessive or differential settlement and resulting structural damage. RLI is informed and
24 believes that Markel agreed to accept Langan’s notice and to handle it under the 2014-15 Primary
25 Policy, in part on the basis that Langan personnel had also separately reported the circumstance to
26 Markel personnel during March of 2015. Langan’s notification to Markel of the “circumstance”
27 of Millennium Tower in March of 2015 shall be referred to as the “2014-15 Markel Notice of
28 Circumstance.”

1 36. A true and correct copy of the April 17, 2015 e-mail reflecting and memorializing
 2 the 2014-15 Markel Notice of Circumstance is attached hereto as Exhibit E.

3 37. In addition to the affirmative misrepresentations identified herein, Langan
 4 concealed and failed to disclose to RLI during the 2015-16 application process or prior to the
 5 effective date of the 2015-16 Policy: the fact of Millennium Tower's settlement, T&R's alleged
 6 implication in causing or contributing to it, T&R's 2008 Notice of Circumstances, T&R's and
 7 LEES' continuing work and potential involvement in claims relating to the Millennium Tower,
 8 and the 2014-15 Markel Notice of Circumstance.

9 38. In addition to the affirmative misrepresentations identified herein, Langan failed to
 10 correct for the prior misrepresentations and concealments from the 2014-15 Policy application
 11 process, including its false August 25, 2014 Letter.

12 39. In reliance on Langan's material misrepresentations and concealments, RLI issued
 13 Excess Professional Liability Policy no. RDP0019163, with a policy period of April 1, 2015 to
 14 April 1, 2016 (the "2015-16 Policy").

15 40. Via endorsement to the 2015-16 Policy, Langan agreed that RLI "has relied upon
 16 the statements and representations contained in the [2015 Application] (including materials
 17 submitted thereto, and, if such application is a renewal application, all such previous policy
 18 applications, and their attachments and materials, for which this Policy is a renewal or succeeds in
 19 time) as being accurate and complete. It is further understood and agreed that the Named Insured
 20 and the Insureds warrant and represent to [RLI] that the statements and representations made in
 21 such application were accurate on the date such representations and statements were so given and
 22 in connection therewith the Insureds hereby reaffirm each and every statement made in the
 23 application to RLI Insurance Company as accurate as of 12/5/2014 as if it was made to the Insurer
 24 on such date. All such statements and representations shall be deemed to be material to the risk
 25 assumed by the Insurer, are the basis of this Policy and are to be considered as incorporated into
 26 this Policy."

27 41. On or about January 5, 2016, Langan applied for insurance with RLI on a renewal
 28 basis, for the following April 1, 2016 – April 1, 2017 Policy Period, submitting an application

1 that had been signed by Langan on November 20, 2015 (the “2016-17 Application”).

2 42. A true and correct copy of the 2016-17 Application is attached as Exhibit F.

3 43. Langan answered “No” to question no. 28(b) on the 2016-17 Application: “Is the
4 Applicant (after proper inquiry of each Director, Officer or Partner of the Applicant or other
5 prospective insured party) aware of any circumstance, incident, situation or accident during the
6 past ten years which may result in a claim being made against the Applicant, its Predecessors in
7 business, or any of the present or past Partners, Officers or Directors of the Applicant.”

8 44. Langan’s answer to question no. 28(b) on the 2016-17 Application was false.

9 45. Langan answered “No” to question no. 28(d) on the 2016-17 Application: “Has the
10 Applicant or any other party proposed for insurance knowledge of injury to people or damage to
11 property during the [last] five years on or at projects where the Applicant has rendered
12 professional services?”

13 46. Langan’s answer to question no. 28(d) on the 2016-17 Application was false.

14 47. On or about March 21, 2016, RLI asked Langan to submit an updated application
15 for the 2016-17 renewal. On March 21, 2016, Langan signed and submitted an updated
16 application (the “Updated 2016-17 Application”). The Updated 2016-17 Application answered
17 “no” on question 28(b). That was still false. The Updated 2016-17 Application checked neither
18 box for question 28(d). Langan called no attention to that change (if it was intended), nor did
19 Langan correct the inaccurate “no” answer previously provided.

20 48. A true and correct copy of the Updated 2016-17 Application is attached as Exhibit
21 G.

22 49. In addition to the affirmative misrepresentations identified herein, Langan
23 concealed and failed to disclose the fact of Millennium Tower’s settlement, T&R’s alleged
24 implication in causing or contributing to it, T&R’s 2008 Notice of Circumstances, T&R’s and
25 LEES’ continuing work and potential involvement in claims relating to the Millennium Tower,
26 and the 2014-15 Markel Notice of Circumstance.

27 50. In addition to the affirmative misrepresentations identified herein, Langan failed to
28 correct for the prior misrepresentations and concealments from the 2014-15 Policy application

1 process and the 2015-16 Policy application process, including the false August 25, 2014 Letter.

2 51. In reliance on Langan's material misrepresentations and concealments, RLI issued
 3 Excess Professional Liability Policy no. RDP0023900, with a policy period of April 1, 2016 to
 4 April 1, 2017 (the "2016-17 Policy").

5 52. Via endorsement to the 2016-17 Policy, Langan agreed that RLI "has relied upon
 6 the statements and representations contained in the [2016 Application] (including materials
 7 submitted thereto, and, if such application is a renewal application, all such previous policy
 8 applications, and their attachments and materials, for which this Policy is a renewal or succeeds in
 9 time) as being accurate and complete. It is further understood and agreed that the Named Insured
 10 and the Insureds warrant and represent to [RLI] that the statements and representations made in
 11 such application were accurate on the date such representations and statements were so given and
 12 in connection therewith the Insureds hereby reaffirm each and every statement made in the
 13 application to RLI Insurance Company as accurate as of 3/21/2016 as if it was made to the Insurer
 14 on such date. All such statements and representations shall be deemed to be material to the risk
 15 assumed by the Insurer, are the basis of this Policy and are to be considered as incorporated into
 16 this Policy."

17 53. On or about January 6, 2017, Langan applied for insurance with RLI on a renewal
 18 basis, for the following April 1, 2017 – April 1, 2018 Policy Period, submitting an application
 19 that had been signed by Langan on January 5, 2017 (the "2017-18 Application").

20 54. A true and correct copy of the 2017-18 Application is attached as Exhibit H.

21 55. Langan checked neither box on question no. 28(b) on the 2017 Application: "Is the
 22 Applicant (after proper inquiry of each Director, Officer or Partner of the Applicant or other
 23 prospective insured party) aware of any circumstance, incident, situation or accident during the
 24 past ten years which may result in a claim being made against the Applicant, its Predecessors in
 25 business, or any of the present or past Partners, Officers or Directors of the Applicant."

26 56. Langan checked neither box on question no. 28(d) on the 2017 Application: "Has
 27 the Applicant or any other party proposed for insurance knowledge of injury to people or damage
 28 to property during the [last] five years on or at projects where the Applicant has rendered

professional services?"

57. Langan concealed and failed to disclose the fact of Millennium Tower's settlement, T&R's alleged implication in causing or contributing to it, T&R's 2008 Notice of Circumstances, T&R's and LEES' continuing work and potential involvement in claims relating to the Millennium Tower, and the 2014-15 Markel Notice of Circumstance.

58. Langan failed to correct for the prior misrepresentations and concealments from the 2014-15 Policy application process, the 2015-16 Policy application process, and the 2016-17 application process, including the false August 25, 2014 Letter.

59. In reliance on Langan's material misrepresentations and concealments, RLI issued Excess Professional Liability Policy no. RDP0028008, with a policy period of April 1, 2017 to April 1, 2018 (the "2017-18 Policy").

60. Via endorsement to the 2017-18 Policy, Langan agreed that RLI "has relied upon the statements and representations contained in the [2016 Application] (including materials submitted thereto, and, if such application is a renewal application, all such previous policy applications, and their attachments and materials, for which this Policy is a renewal or succeeds in time) as being accurate and complete. It is further understood and agreed that the Named Insured and the Insureds warrant and represent to [RLI] that the statements and representations made in such application were accurate on the date such representations and statements were so given and in connection therewith the Insureds hereby reaffirm each and every statement made in the application to RLI Insurance Company as accurate as of 1/5/2017 as if it was made to the Insurer on such date. All such statements and representations shall be deemed to be material to the risk assumed by the Insurer, are the basis of this Policy and are to be considered as incorporated into this Policy."

FIRST CLAIM FOR RELIEF
(RESCISSIION OF 2014-15 POLICY)

61. RLI reiterates and incorporates Paragraphs 1-60, above, as though fully set forth herein.

62. A true and correct copy of the 2014-15 Policy is attached as Exhibit I.

63. In the process of applying for the 2014-15 Policy, Langan affirmatively misrepresented and concealed material facts concerning T&R's and Langan's knowledge of and potential exposure to losses related to the Millennium Tower settlement.

64. Langan's "No" answer to question 28(b) of the 2014-15 Application was false.

65. Langan's "No" answer to question 28(d) of the 2014-15 Application was false.

66. Langan's August 25, 2014 Letter to RLI was false.

67. Langan concealed the fact that it and T&R were aware of claims or potential claims that existed against one or both of them relating to the Millennium Tower settlement.

68. Langan concealed the fact that T&R had served the 2008 Notice of Circumstance to Terra Insurance, identifying Millennium Tower as a potential claim.

69. The facts misrepresented and concealed by Langan were each and all material to the risk to be underwritten by RLI under the 2014-15 Policy.

70. RLI is entitled to rescission and hereby rescinds the 2014-15 Policy, in its entirety, void *ab initio*. RLI offers to return the premium paid by Langan, which reflects the benefits received under the contract, in the amount reflected on the Declarations Page of the Policy (redacted from the Complaint exhibit but known to Langan). Langan may consent to rescission and accept this return premium by so indicating in its response to this Pleading.

SECOND CLAIM FOR RELIEF
(RESCISSIION OF 2015-16 POLICY)

71. RLI reiterates and incorporates Paragraphs 1-70, above, as though fully set forth herein.

72. A true and correct copy of the 2015-16 Policy is attached as Exhibit J.

73. In the process of applying for the 2015-16 Policy, Langan affirmatively misrepresented and concealed material facts concerning T&R's and Langan's knowledge of and potential exposure to losses related to the Millennium Tower settlement.

74. Langan's "No" answer to question 28(b) of the 2015-16 Application was false.

75. Langan's "No" answer to question 28(d) of the 2015-16 Application was false.

76. Langan concealed the fact that it and T&R were aware of claims or potential

1 claims that existed against one or both of them relating to the Millennium Tower settlement.

2 77. Langan concealed the fact that T&R had served the 2008 Notice of Circumstance
3 to Terra Insurance, identifying Millennium Tower as a potential claim.

4 78. Langan concealed the fact that it had served the 2014-15 Markel Notice of
5 Circumstance, an event that occurred between the date Langan submitted its application and the
6 inception date of the 2015-16 Policy.

7 79. The facts misrepresented and concealed by Langan were each and all material to
8 the risk to be underwritten by RLI under the 2015-16 Policy.

9 80. RLI is entitled to rescission and hereby rescinds the 2015-16 Policy, in its entirety,
10 void *ab initio*. RLI offers to return the premium paid by Langan, which reflects the benefits
11 received under the contract, in the amount reflected on the Declarations Page of the Policy
12 (redacted from the Complaint exhibit but known to Langan). Langan may consent to rescission
13 and accept this return premium by so indicating in its response to this Pleading.

14 **THIRD CLAIM FOR RELIEF**
15 **(RESCISSION OF 2016-17 POLICY)**

16 81. RLI reiterates and incorporates Paragraphs 1-80, above, as though fully set forth
17 herein.

18 82. A true and correct copy of the 2016-17 Policy is attached as Exhibit K.

19 83. In the process of applying for the 2016-17 Policy, Langan affirmatively
20 misrepresented and concealed material facts concerning T&R's and Langan's knowledge of and
21 potential exposure to losses related to the Millennium Tower settlement.

22 84. Langan's "No" answer to question 28(b) of the 2016-17 Application, both in its
23 original 11/20/15 Application and again in its 3/21/16 Updated 2016-17 Application, was false.

24 85. Langan's "No" answer to question 28(d) of the 2016-17 Application, signed on
25 11/20/15, was false. Langan's silent failure to answer question 28(d) on its 3/21/16 Updated
26 2016-17 Application did not correct for its earlier affirmative misrepresentation.

27 86. Langan concealed the fact that it and T&R were aware of claims or potential
28 claims that existed against one or both of them relating to the Millennium Tower settlement.

87. Langan concealed the fact that T&R had served the 2008 Notice of Circumstance to Terra Insurance, identifying Millennium Tower as a potential claim.

88. Langan concealed the fact that it had served the 2014-15 Markel Notice of Circumstance.

89. The facts misrepresented and concealed by Langan were each and all material to the risk to be underwritten by RLI under the 2016-17 Policy.

90. RLI is entitled to rescission and hereby rescinds the 2016-17 Policy, in its entirety, void *ab initio*. RLI offers to return the premium paid by Langan, which reflects the benefits received under the contract, in the amount reflected on the Declarations Page of the Policy (redacted from the Complaint exhibit but known to Langan). Langan may consent to rescission and accept this return premium by so indicating in its response to this Pleading.

FOURTH CLAIM FOR RELIEF
(RESCISSON OF 2017-18 POLICY)

91. RLI reiterates and incorporates Paragraphs 1-90, above, as though fully set forth herein.

92. A true and correct copy of the 2017-18 Policy is attached as Exhibit L.

93. In the process of applying for the 2017-18 Policy, Langan affirmatively misrepresented and concealed material facts concerning T&R's and Langan's knowledge of and potential exposure to losses related to the Millennium Tower settlement.

94. Langan declined to answer question 28(b) of the 2017 Application. Yet Langan did not correct, and thereafter expressly adopted, its prior false “No” answers.

95. Langan's declined to answer question 28(d) of the 2017 Application. Yet Langan did not correct, and thereafter expressly adopted, its prior false "No" answers.

96. Langan concealed the fact that it and T&R were aware of potential claims or claims that existed against one or both of them relating to the Millennium Tower settlement.

97. Langan concealed the fact that T&R had served the 2008 Notice of Circumstance to Terra Insurance, identifying Millennium Tower as a potential claim.

98. Langan concealed the fact that it had served the 2014-15 Markel Notice of

Circumstance.

99. The facts misrepresented and concealed by Langan were each and all material to the risk to be underwritten by RLI under the 2017-18 Policy.

100. RLI is entitled to rescission and hereby rescinds the 2017-18 Policy, in its entirety, void *ab initio*. RLI offers to return the premium paid by Langan, which reflects the benefits received under the contract, in the amount reflected on the Declarations Page of the Policy (redacted from the Complaint exhibit but known to Langan). Langan may consent to rescission and accept this return premium by so indicating in its response to this Pleading.

FIFTH CLAIM FOR RELIEF
(DECEIT -- FRAUD)

101. RLI reiterates and incorporates Paragraphs 1-60, above, as though fully set forth herein.

102. By virtue of each and all of the misrepresentations and concealments specifically identified above, in paragraph nos. 17, 19, 21, 22, 23, 25, 30, 32, 37, 38, 43, 45, 47, 49, 50, 55, 56, 57, & 58, Langan affirmatively misrepresented and/or purposefully concealed material facts in the course of applying for insurance from RLI.

103. Acting as and on behalf of prospective insureds applying for insurance with RLI under each and all of the Policies, Langan owed a duty to RLI to answer the questions on the application truthfully, to only make truthful representations and to disclose all known facts material to the risk that RLI was being asked to undertake.

104. Langan intentionally misrepresented, concealed or suppressed the true facts regarding Millennium Tower, T&R's and Langan's involvement and potential exposure to claims relating to Millennium Tower, and T&R's and Langan's awareness of and notices of circumstances and potential claims relating to Millennium Tower, as pleaded herein, in order to induce reliance by RLI and specifically, to induce RLI to issue a \$5 million policy of insurance in each of four consecutive policy years. RLI justifiably relied on Langan's misrepresentations and concealments by issuing such policies.

105. RLI has been damaged, and it continues to be damaged, in that it has incurred

1 expense and has been called upon to expend further sums by virtue of its issuance of the
2 fraudulently induced policies, in an amount to be proven at trial.

3 106. RLI is informed and believes and thereon alleges that Langan's deceit was willful
4 and knowing, in that it was not and could not have been genuinely unaware of the true facts that it
5 misrepresented and concealed from RLI, but rather undertook to double its available insurance
6 limits at RLI's expense, with full knowledge and awareness of the Millennium Tower exposure
7 that was materializing and fast approaching, so as to support the imposition of exemplary
8 damages in the event this deceit is proven at trial.

SIXTH CLAIM FOR RELIEF
(DECEIT – NEGLIGENT MISREPRESENTATION)

11 107. RLI reiterates and incorporates Paragraphs 1-60, above, as though fully set forth
12 herein.

13 108. By virtue of each and all of the misrepresentations specifically identified above, in
14 paragraph nos. 17, 19, 21, 22, 23, 30, 32, 37, 43, 45, 47, 55, & 56, Langan affirmatively
15 misrepresented material facts to RLI.

16 109. Acting as and on behalf of prospective insureds applying for insurance with RLI
17 under each and all of the Policies, Langan owed a duty to RLI to answer the questions on the
18 application truthfully, to only make truthful representations and to disclose all known facts
19 material to the risk that RLI was being asked to undertake.

20 110. Langan's misrepresentations were made without reasonable grounds for believing
21 them to be true, and with the intent to induce reliance by RLI and specifically, to induce RLI to
22 issue a \$5 million policy of insurance in each of four consecutive policy years. RLI justifiably
23 relied by issuing such policies.

24 111. RLI has been damaged, and it continues to be damaged, in that it has incurred
25 costs and may be called upon to expend further sums by virtue of its issuance of the fraudulently
26 induced policies, in an amount to be proven at trial.

27 |||

28 |||

1 **SEVENTH CLAIM FOR RELIEF**
 2 *Pleading in The Alternative to Rescission*
 3 (DECLARATORY RELIEF – CLAIMS MADE AND REPORTED)

4 112. RLI reiterates and incorporates Paragraphs 1-60, above, as though fully set forth
 herein.

5 113. This claim for relief is pled in the alternative to, and without waiver of, the
 6 rescission counts set forth above. Each of the four RLI excess policies has been rescinded. The
 7 alternative claims are alleged in the event Langan does not accept the rescission, asserts defenses
 8 to it, or it otherwise transpires that a prompt judicial determination as to the efficacy of the
 9 rescission is not adjudicated.

10 114. In March of 2015, Langan received and reported to Markel a notice of
 11 circumstance regarding potential liability relating to the settlement of Millennium Tower, under
 12 Alterra Excess & Surplus Lines Insurance Company Policy no. MAX7PL0001189 (the “2014-15
 13 Primary Policy.”) Alterra was one underwriting subsidiary within the Markel family of insurance
 14 companies. An e-mail memorializing Langan’s prior report to Markel was sent on April 17,
 15 2015. Langan and Markel have agreed that notice of circumstance was effectively reported in
 16 March of 2015, under the 2014-15 Primary Policy.

17 115. In 2016, Langan contends that it first received written demands and the first of a
 18 series of lawsuits and cross-claims seeking to impose liability on T&R and LEES because of
 19 alleged professional negligence relating to the Millennium Tower settlement. RLI is informed
 20 and believes and thereon alleges that a number of lawsuits all relating to Millennium Tower and
 21 alleging damages, *inter alia*, resulting from its excessive or differential settlement, are presently
 22 pending in a consolidated proceeding, in San Francisco Superior Court, under the lead case
 23 captioned: *Lehman, et al., v. Transbay Joint Powers Authority, et al.*, no. CGC-16-553758.
 24 Other cases consolidated include, at least, nos. CGC-17-557830; CGC-17-556292; CGC-17-
 25 558649; CGC-17-559210; CGC-17-560322. All consolidated and related cases are collectively
 26 referred to herein as the “Millennium Tower Litigation.”

27 116. The 2014-15 Primary Policy’s Section XII – Notice of Claim or Circumstance,
 28 Paragraph B.3. provides that “If, during the Policy Period any director, officer, principal, partner,

1 insurance manager or any member of the risk management or legal department of the Insured
 2 Organization first becomes aware of any Circumstance and gives written notice to the
 3 Underwriters,” then “any subsequent Claim made against the Insured arising out of such
 4 Circumstance which is the subject of the written notice will be deemed to have been made at the
 5 time the written notice complying with the above requirements was first given to the
 6 Underwriters.” Therefore, by operation of the plain terms of that contract, and the fact of the
 7 2014-15 Markel Notice of Circumstances, the series of Claims related to the Millennium Tower
 8 Litigation are and have been deemed to be “claims made” during the 2014-15 Policy Period.²

9 117. RLI’s excess 2014-15 Policy requires that notice to RLI “shall be given as
 10 provided in the Primary Policy at the respective address shown in Item 9. of the Declarations.
 11 Any notice to the insurer of the Underlying Insurance shall not constitute notice to [RLI] unless
 12 also given to [RLI] as provided above.”

13 118. Langan did not report the notice of circumstance to RLI in accordance with the
 14 2014-15 Excess Policy.

15 119. Langan first provided notice of any potential liability for Millennium Tower to
 16 RLI in August of 2016, some 16 months after the 2014-15 Policy Period had expired.

17 120. The Claims related to the Millennium Tower Litigation were not Claims first made
 18 against Langan and/or T&R during the 2016-17 Policy Period. Rather, under the plain terms of
 19 the 2014-15 Policy and pursuant to Langan’s notice of circumstance reported to Markel (but not
 20 RLI) in March of 2015, the Claims related to the Millennium Tower Litigation were Claims first
 21 made during the 2014-15 Policy Period (if not before).

22 121. Any Claim made against an Insured during the 2014-15 Policy must be reported to
 23 RLI “in no event later than sixty (60) days after the expiration of the Policy Period. . .”

25 ² To be clear, this is not intended as an admission that no “Claim” was in fact made against Langan or T&R
 prior to the 2014-15 Policy Period. This is the case-originating complaint. RLI has not had the benefit of discovery
 26 into the files of T&R, Langan and all the other parties involved in Millennium Tower and the adjoining properties
 since 2008. It is certainly within the realm of probability that somewhere before August 25, 2014, T&R or Langan
 27 would have received, from somebody, “A written demand for monetary damages, services or non-monetary relief” or
 a “civil, administrative or regulatory investigation,” for example, constituting a “Claim.” That would affect both the
 28 question of Claim timing for claims-made coverage purposes, and also the grounds for rescission identified above.
 All rights are reserved, including the right to seek to amend the pleading upon further discovery.

1 122. By virtue of the foregoing, RLI contends that the Claims Langan tendered to RLI
2 during the 2016-17 Policy Period were not Claims “first made against the Insured during the
3 Policy Period” of 2016-17. They were Claims first made during the 2014-15 Policy Period (if not
4 before); yet they were reported to RLI 16 months after that policy period had expired. Langan’s
5 non-compliance with the reporting requirements precludes coverage under the 2014-15 Policy.

6 123. RLI is informed and believes and thereon alleges that Langan disputes these
7 contentions, and instead contends that the Millennium Tower Litigation Claims should be handled
8 by RLI under the terms of its 2014-15 Policy.

9 124. By virtue of the foregoing, there presents a justiciable controversy between RLI
10 and Langan regarding the availability of coverage for the Millennium Tower Litigation Claims
11 under one or both of the 2014-15 Policy or the 2016-17 Policy.

12 125. RLI seeks a judicial declaration, under 28 U.S.C. §§ 2201 et seq., that the
13 Millennium Tower Litigation Claims are not covered under its contracts of insurance with
14 Langan, by virtue of the claims-made and reporting provisions.

EIGHTH CLAIM FOR RELIEF

EIGHTH CLAIM FOR RELIEF

(DECLARATORY RELIEF – RELATED CLAIMS AND NOTICE OF CIRCUMSTANCE)

17 126. RLI reiterates and incorporates Paragraphs 1-60 and 112-125, above, as though
18 fully set forth herein.

19 127. This claim for relief is pled in the alternative to, and without waiver of, the
20 rescission counts set forth above. Each of the four RLI excess policies has been rescinded. The
21 alternative claims are alleged in the event Langan does not accept the rescission, asserts defenses
22 to it, or it otherwise transpires that a prompt judicial determination as to the efficacy of the
23 rescission is not adjudicated.

24 128. The Millennium Tower Litigation entails numerous lawsuits with numerous
25 parties, complaints and cross-complaints, filed between 2016 and the present, all arising from and
26 related to allegations, *inter alia*, that Millennium Tower is settling excessively into the soil and/or
27 settling differentially and thus tilting, at least in part because of allegedly deficient geotechnical
28 engineering services provided by T&R and/or LEES. [To be clear, there are many other

1 defendants including developers, marketers, public agencies, general contractors, subcontractors,
 2 architects and engineers, and many other alleged causes of loss also being alleged in the lawsuits.]

3 129. Under the terms of the 2014-15 Primary Policy, terms to which RLI's excess
 4 2014-15 Policy follow form, "Multiple Claims arising from the same or a series of related or
 5 repeated acts, errors, omissions or Pollution Conditions or from any continuing acts, errors,
 6 omissions or Pollution Conditions shall be considered a single Claim for the purposes of this
 7 Policy, irrespective of the number of Claimants or Insureds involved in the Claim. [¶] All such
 8 Claims shall be deemed to have been made at the time of the first such Claim."

9 130. All the Millennium Tower Litigation Claims against Langan and T&R thus
 10 constitute a single Claim, deemed made at the time of the first Claim that was made.

11 131. The 2014-15 Primary Policy's Section XII – Notice of Claim or Circumstance, to
 12 which the RLI excess 2014-15 Policy follows form, provides that if an Insured provides a Notice
 13 of Circumstance within the 2014-15 policy period, then "any subsequent Claim made against the
 14 Insured arising out of such Circumstance which is the subject of the written notice will be deemed
 15 to have been made at the time when the written notice complying with the above requirements
 16 was first given to the Underwriters."

17 132. Under the 2014-15 Primary Policy, Langan reported a notice of circumstance to
 18 Markel, identifying the Millennium Tower project, the estimated and actual pace and magnitude
 19 of settlement, differential settlement, and claims of resulting property damage. All Claims of the
 20 Millennium Tower Litigation against the Insureds "arise out of" those circumstances. Thus,
 21 assuming there were no "Claims" made against T&R or Langan prior to the 2014-15 Policy
 22 Period, all would be deemed made during the 2014-15 Policy Period.

23 133. By virtue of the foregoing, RLI contends that all Claims related to the Millennium
 24 Tower Litigation are considered a single Claim, deemed to have been made at the time of the first
 25 such Claim. RLI further contends that under Section XII.B. of the 2014-15 Policy, all Claims
 26 related to the Millennium Tower Litigation "arise out of" the "Circumstance" that Langan
 27 reported to Markel during the 2014-15 Policy Period. RLI is informed and believes and thereon
 28 alleges that Langan disputes these contentions, and rather contends that the Millennium Tower

Litigation involves unrelated Claims that may implicate more than one Policy Period.

134. By virtue of the foregoing, there now exists a justiciable controversy between RLI and Langan regarding the number and timing of the multiple Claims relating to the Millennium Tower litigation.

135. RLI seeks a judicial declaration, under 28 U.S.C. §§ 2201 et seq., that the Millennium Tower Litigation Claims are related claims all deemed to have been made in the 2014-15 Policy Period or that they arise out of the Circumstance that Langan first reported to Markel during the 2014-15 Policy Period.

NINTH CLAIM FOR RELIEF
Pledged in The Alternative to Rescission
(DECLARATORY RELIEF – EXCESS COVERAGE)

136. RLI reiterates and incorporates Paragraphs 1-60 and 112-135, above, as though fully set forth herein.

137. This claim for relief is pled in the alternative to, and without waiver of, the rescission counts set forth above. Each of the four RLI excess policies has been rescinded. The alternative claims are alleged in the event Langan does not accept the rescission, asserts defenses to it, or it otherwise transpires that a prompt judicial determination as to the efficacy of the rescission is not adjudicated.

138. Each RLI excess policy provides, by its express terms, that "Subject to and except as otherwise stated in this Policy, the Insurer shall prove the Insureds with insurance in accordance with the limitations, conditions, provisions and other terms of the Primary Policy. . . . In no event shall this Policy grant broader coverage than would be provided by any of the Underlying Insurance. Liability shall attach to the Insurer only after the insurers of the Underlying Insurance or the Insureds pay in legal currency as loss covered thereunder the full amount of the Underlying Limit."

139. RLI's excess coverage does not and would not apply, if at all, in the absence of exhaustion of the Underlying Limit by the actual payment of loss covered thereunder, which has not occurred. Accordingly, RLI can owe no present contractual duty with respect to the Millennium Tower Litigation or any other claims under the terms of the RLI excess policies.

1 140. The primary policies, to which RLI's excess coverage follow form, contain various
 2 conditions, exclusions and definitions that are applicable or potentially applicable to some of the
 3 claims asserted in the Millennium Tower Litigation, including:

- 4 A. The insuring agreement of Coverage A, Architects and Engineers
 Professional Liability, extends only to certain "Professional Services";
 defined as "those services performed for others by or on behalf of the
 Insured Organization in the practice of architecture, engineering, land
 surveying, landscape architecture, interior design, project or construction
 management or environmental consulting, or as set forth in endorsements
 to this Policy."
- 5 B. Exclusion VI.B, Insured versus Insured, bars coverage to the extent of any
 claims asserted by or against Langan with regard to any other person or
 entity that is an insured under the policies;
- 6 C. Exclusion VI.E, Assumption of Contractual Liability of Others, bars
 coverage for liability arising out of or resulting from the liability of others
 assumed by the Insured under any contract or agreement either oral or
 written, including any hold harmless or indemnity agreements;
- 7 D. Exclusion VI.F, Express Warranties, Representations, Guarantees and
 Promises, bars coverage for liability for or arising out of or resulting from
 (1) breach of any express warranty or representation except for an
 agreement to perform within a reasonable standard of care consistent with
 applicable industry standards; or (2) breach of guarantee; and
- 8 E. Exclusion VI.G, Faulty Workmanship, bars coverage for damages arising
 out of the cost to repair or replace any faulty construction workmanship
 performed in whole or in part by any Insured on any construction, erection,
 fabrication, installation, assembly, manufacture or remediation, including
 any materials, parts, labor or equipment furnished in connection with such
 repair or replacement.

1 141. Langan has demanded coverage for, *inter alia*, the Millennium Tower Litigation,
2 notwithstanding the coverage terms, definitions and limitations contained within the RLI excess
3 liability insurance policies. RLI disputes that the policies as written would apply, in whole or in
4 part, on the basis of the facts presently extant. There exists a justiciable controversy, in the event
5 the policies are not adjudicated to have been rescinded, regarding the coverage afforded under the
6 parties' contracts of insurance and their applicability to all or some of the claims and cross-claims
7 alleged in the Millennium Tower Litigation.

8 142. RLI seeks the entry of a declaratory judgment regarding the applicability of the
9 coverage under its insurance contracts with Langan with respect to the claims alleged and any
10 judgment or settlement that may be entered with respect to the Millennium Tower Litigation.

PRAYER FOR RELIEF

WHEREFORE, RLI Insurance Company respectfully prays for relief as follows:

13 1. On its First Claim for Relief, for an adjudication that the 2014-15 Policy is
14 rescinded;

15 2. On its Second Claim for Relief, for an adjudication that the 2015-16 Policy is
16 rescinded:

17 3. On its Third Claim for Relief, for an adjudication that the 2016-17 Policy is
18 rescinded:

19 4. On its Fourth Claim for Relief, for an adjudication that the 2017-18 Policy is
20 rescinded:

21 5. On its Fifth Claim for Relief, compensatory damages in an amount to be proven at
22 trial; and, upon a finding of malice, fraud or oppression, imposition of exemplary damages;

23 6. On its Sixth Claim for Relief, compensatory damages in an amount to be proven at
24 trial;

25 7. On its Seventh Claim for Relief, a declaratory judgment that no coverage is owed
26 for the Millennium Tower Litigation because of the insuring agreement requirements and the
27 reporting provisions of these claims made and reported policies;

²⁸ On Its Eighth Claim for Relief, a declaratory judgment that the Claims related to

1 the Millennium Tower Litigation constitute a single Claim made at the time of the first such
2 Claim, and/or that the Claims related to the Millennium Tower Litigation arise out of the
3 circumstances that Langan reported to Markel during the 2014-15 Policy Period.

4 9. On its Ninth Claim for Relief, a declaratory judgment that RLI owes no present
5 coverage obligation under the terms of its insurance contracts with Langan, and for the
6 determination of the existence and scope of any obligation with regard to a judgment or
7 settlement that may hereafter be entered with respect to the Millennium Tower Litigation.

8 10. For prejudgment interest and for costs of suit, to the extent permitted by law; and

9 11. For such other and further relief as the Court may deem just and proper.

10 Dated: April 15, 2019

MORISON & PROUGH, LLP

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By: /s/ Michael D. Prough
Michael D. Prough

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Attorneys for Plaintiff
RLI INSURANCE COMPANY

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DEMAND FOR JURY TRIAL

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Plaintiff RLI Insurance Company, by and through its counsel, hereby demands a trial by
jury of all issues so triable in the above-entitled matter.

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Dated: April 15, 2019

MORISON & PROUGH, LLP

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By: /s/ Michael D. Prough
Michael D. Prough

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Attorneys for Plaintiff
RLI INSURANCE COMPANY

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